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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG - 8 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
UACC Midwest, Inc. d/b/a)	CC Docket No. 95-94
United Artists Cable Mississippi)	
Gulf Coast; et al.)	
)	PA 91-0005 through
v.)	PA 91-0009
)	
South Central Bell Telephone)	
Company)	DOCKET FILE COPY ORIGINAL

To: The Hon. Joseph Chachkin, Administrative Law Judge

REPLY TO OPPOSITION

BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company, by counsel ("SCB"), pursuant to the Commissions Rules of Practice and Procedure, 47 C.F.R §§ 1.4(g), 1.4(h), 1.45(b) and 1.229(d) hereby replies to the oppositions to SCB's motion to enlarge issues filed by the separated trial staff and four of the complainants ("UACC") in these five consolidated proceedings.¹

Both the separated trial staff and UACC misapprehend the scope of SCB's motion and rely on flawed logic in an

¹ Vicksburg Video, Inc. ("Vicksburg"), complainant in proceeding PA-910007, does not oppose SCB's motion. Counsel for the complainants in proceedings 91-0005, 91-0006, 91-0008 and 91-0009 includes Vicksburg above the signature line of its opposition, however, counsel for Vicksburg did not sign the opposition and was served separately. Further, counsel for Vicksburg entered a separate Notice of Appearance in this docket on July 5, 1995, separately signed the Joint Report filed herein on August 7, and had been negotiating separately with counsel for SCB until August 4, 1995.

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attempt to deprive SCB of its procedural rights to a fair hearing.

I. THE JUNE 22 LETTER IS NOT A PROPERLY PROMULGATED ADMINISTRATIVE RULE OR REGULATION

Both the separated trial staff and UACC rely on the June 22, 1990 letter from the Accounting and Audits Division of the Common Carrier Bureau to a lawyer with Cole, Raywid & Braverman and counsel for UACC (the "June 22 Letter"), to oppose SCB's motion. The June 22 Letter was not promulgated pursuant to the requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. §553. It was never published for public notice and comment by affected parties. It was never the subject of Commission review.² It does not, contrary to separated trial staff's assertion, have the same legal force and effect as the Commission's Pole Attachment Order, which does govern this case and which was promulgated pursuant to the APA.³ The June 22 Letter constitutes a new methodology for computing the maximum allowable rate for pole attachments; but for the existence

² UACC alleges that Accounting & Audits staff worked six months on the June 22 letter. This unsupported allegation is irrelevant; no amount of time spent by staff behind closed doors can justify imposing substantive changes to an agency's rules without proceeding through notice and comment rulemaking. UACC's argument that no party challenged this letter after its publication in the FCC Record is unavailing; mere publication of correspondence does not constitute notice and comment rulemaking.

³ Common Carrier Bureau, Opposition to Motion to Enlarge at para. 1. The Pole Attachment Order is found at 2 FCC Rcd 4387 (1987).

of the letter, there would be no dispute remaining in these causes. As the separated trial staff concedes, a rulemaking, not an adjudicatory proceeding, is the proper forum to consider such changes in methodology.⁴ When an agency bureau applies staff correspondence as if it were the substantive rule and regulation of the administrative agency itself, and thereby limits a defendant's due process rights when its property is at stake, sufficient circumstances exist to warrant an enlargement of the issues designated for hearing.

II. SCB IS ENTITLED TO DEFEND THIS COMPLAINT BY DEMONSTRATING THAT THE RATES AT ISSUE FALL WELL BELOW THE STATUTORY MAXIMUM.

The complaints in this docket are designated for hearing in this docket upon, inter alia, the following:

1. To determine whether South Central Bell charged Complainants pole attachment rates that exceeded the maximum amounts allowable under Commission rules during the periods covered by the complaints.⁵

The Pole Attachments Act establishes a range of just and reasonable pole attachment rates.⁶ All SCB is attempting to do is to be allowed to demonstrate, consistent with the Pole Attachment Order, a range of rates, from low to high, to

⁴ Common Carrier Bureau, Opposition to Motion to Enlarge Issues, para. 6 (citing New York University, 10 FCC 2d 53, 57 (Rev. Bd. 1967)).

⁵ Hearing Designation Order, para. 24.

⁶ Pole Attachment Order, 2 FCC Rcd at 4387, para. 3.

show that its actual rates fall well below the statutory maximum.

In paragraph 19 of the Hearing Designation Order, the ALJ is directed to resolve what portion of Accounts 6124, 6231 and 6535. As these three accounts are not the only elements that are properly included in the pole attachment rate formula, it does not follow that if any portion of these accounts are disallowed, SCB's rates are, as a matter of law, excessive. SCB can show, and indeed has shown in its Response to Data Request, that other elements are properly included, but were not. SCB is not attempting to establish new rates, simply that it legally could have established even higher rates. The fact that it has justified the rate established in 1991 should not foreclose SCB from showing that that rate was not the only rate it could have developed consistent with the Pole Attachments Act.

Both the separated trial staff and UACC miss this point and falsely accuse SCB of attempting to relitigate issues, and of attempting to change the Commission's pole attachment formula. The separated trial staff incorrectly argues that SCB "wants to promote a new methodology."⁷ Most of

⁷ To the extent the Bureau is genuinely interested in encouraging settlement between the parties, it should carefully consider whether it should authorize its separated trial staff to actively oppose a party in its attempts to secure a fair hearing, thus diverting time and resources from achieving settlement.

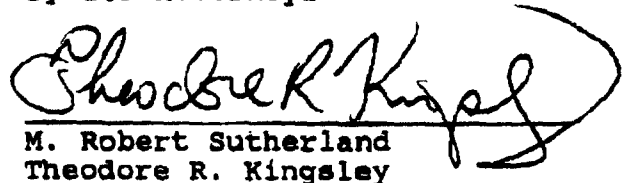
complainants' opposition is given over to a cable-industry version of the entire history of pole attachment regulation. This is a simple case about pole attachment rates SCB charged in Mississippi from 1991 forward; accordingly, SCB does not accept complainant's challenge to engage in a political debate in this forum.

Conclusion

For the foregoing reasons, the oppositions to motion to enlarge filed by separated trial staff and UACC should be denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS,
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August 8, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of August, 1995 served all parties to this action with a copy of the foregoing **REPLY TO OPPOSITION** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.


Gwendolyn M. Burleson

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